No. 14-915

In the Supreme Court of the United States

REBECCA FRIEDRICHS, ET AL.,

Petitioners,

–v–

CALIFORNIA TEACHERS ASSOCIATION, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL COUNCIL ON TEACHER RETIREMENT AND THE NATIONAL CONFERENCE ON PUBLIC EMPLOYEE RETIREMENT SYSTEMS IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* AND SUMMARY OF ARGUMENT 1

ARGUMENT 5

I. PUBLIC PENSION SYSTEMS ARE LEGISLATIVE CREATIONS THAT GENERALLY PRE-DATE PUBLIC-SECTOR UNIONS 5

II. PRIMER ON THE DIFFERENCES BETWEEN PUBLIC AND PRIVATE PENSION PLANS 10

III. THE PUBLIC PENSION CHALLENGES EXPERIENCED IN NUMEROUS STATES, INCLUDING ILLINOIS, ARE MOST-OFTEN THE RESULT OF UNDERFUNDING AND OUTSIDE FINANCIAL PRESSURES 12

IV. *PETITIONERS' AMICI'S* ARGUMENTS ABOUT COLLECTIVE BARGAINING'S IMPACT ON PENSION UNDERFUNDING ARE COMPLETELY UNSUPPORTED 15

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

Harris v. Quinn,
573 U.S. __, 134 S. Ct. 2618 (2014) 15

Hightower v. Texas Hosp. Ass'n,
65 F.3d 443 (5th Cir. 1995) 2

In Re Pension Reform Litigation,
2015 IL 118585, 32 N.E.3d 1 (2015) 16, 17

Koval v. Wash. Cnty. Redevelopment Auth.,
574 F.3d 238 (3d Cir. 2009) 2

Rose v. Long Island R.R. Pension Plan,
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("ERISA"), 29 U.S.C. § 1001(b) (1978) 11

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Page

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Page

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Page

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Page

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Page

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INTEREST OF *AMICUS CURIAE* AND SUMMARY OF ARGUMENT[1]

The National Council on Teacher Retirement ("NCTR") has a membership that includes 68 state, territorial and local pension systems that serve more than 19 million active and retired teachers, non-teacher professionals, and other public employees. Founded in 1924, NCTR is dedicated to safeguarding the integrity of public retirement systems in the United States and its territories to which teachers belong and to promoting the rights and benefits of all of its present and future members of the systems.

The National Conference on Public Employee Retirement Systems ("NCPERS") is the largest trade association for public-sector pension funds, representing more than 500 funds throughout the United States and Canada. It is a unique non-profit network of trustees, administrators, public officials and investment professionals who collectively manage nearly $3.5 trillion in pension assets held in trust for

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in any part, no such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and no person or entity other than the Illinois Education Association, the New Jersey Education Association, and the Pennsylvania State Education Association has made such a monetary contribution. Pursuant to Supreme Court Rule 37.3, the parties to this suit have submitted blanket consent to the filing of *amicus curiae* briefs in support of either or neither party, which blanket consent the Clerk of the Court has noted on the docket.

approximately 21 million public employees and retirees—including firefighters, law enforcement officers, teachers, and other public servants.

NCTR and NCPERS submit this brief in response to arguments raised by certain *amici* for the Petitioner ("*Petitioners' Amici*") directed not to the question presented, but to a political question relating to state and local government pensions. Because the issue of public pensions is not related to the question presented, these *Petitioners' Amici's* arguments are contrary to Supreme Court Rule 37(a) and should be considered disfavored. But, given the issue has been interjected in a labor management question, NCTR and NCPERS respectfully file this brief responding solely to the pension issue. State and local government pensions, like collective bargaining for public employees, are an area of traditional state control, and not subject to Congressional regulation under the Tenth Amendment.[2]

Specifically, NCTR and NCPERS are interested in this matter because of the manner in which certain *amici* who support the Petitioners have misrepresented to this Court that pension-fund shortfalls and state-budget crises are the result of, or are significantly related to, collective bargaining relationships. To the contrary, state and local pension systems in nearly all instances are created

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[2] *See, Rose v. Long Island R.R. Pension Plan*, 828 F.2d 910 (2d Cir. 1987); *Koval v. Wash. Cnty. Redevelopment Auth.*, 574 F.3d 238 (3d Cir. 2009); *Hightower v. Texas Hosp. Ass'n*, 65 F.3d 443 (5th Cir. 1995).

by legislation. Moreover, state and local public pension systems pre-date the creation of public unions or the codification of their collective bargaining rights.

For instance, *amici* Bruce Rauner, Governor of Illinois ("Rauner"), and Kaneland Illinois Unified School District #302 Administrative Support Staff, District #302 ("Kaneland"), and *amici* Illinois State Workers suggested in their Briefs in Support of Petitioners (respectively, the "Rauner Brief" and the "Illinois State Workers Brief") that the pension benefits due to Illinois government employees are the result of collective bargaining instead of accurately stating that those benefits arise pursuant to legislation.[3] Other states have similar statutory schemes.[4] Notably, public collective bargaining was not even introduced in law in many states until years or decades *after* pension legislation was first adopted in those states.[5]

Moreover, State Attorneys General for the States of Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Michigan, Nebraska, Nevada, Oklahoma, South Carolina, Texas, Utah, West Virginia, and Wisconsin ("*Amici* States") have made a similar misrepresentation in their *amici*

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[3] *See* 40 ILL. COMP. STAT. 5/1, *et seq.* (2012) (present version initially adopted 1963).

[4] *See, e.g.*, CAL. GOV'T CODE §§ 20000-22944.5 (West).

[5] *See* Illinois Public Labor Relations Act, 5 ILL. COMP. STAT. 315/1, *et seq.* (2013); *compare* Illinois Pension Code, 40 ILL. COMP. STAT. 5/1, *et seq.* *See also* Meyers-Milias-Brown Act, CAL. GOV'T CODE §§ 3500-3511 (West 2001) (originally enacted in 1968) (establishing California's Public Employee Relations Board); *compare* CAL. GOV'T CODE §§ 20000-22944.5 (West).

brief ("State Attorneys General Brief"), claiming without supporting citation, that collective bargaining led to Detroit's unfunded pension liability and eventual bankruptcy. This bald assertion ignores the outside financial crises and poor funding discipline that have been well documented.[6] Then, again without supporting citation, the State Attorneys General Brief claims that unfunded pension liabilities in Stockton and San Bernardino, California were the result of collective bargaining as opposed to outside financial circumstances and chronic under-funding. Again, the States of Michigan and California have pension systems that were formed under legislation independent of those States' public-sector unions.[7]

In all, these *amici* have claimed that legislatively-created pension obligations are somehow the result of collective bargaining and that, as a result, "fair share" provisions should be found unconstitutional to assist States in navigating difficult fiscal matters relating to their pension obligations. NCTR and NCPERS submit this brief to correct the misconception, engendered by these *Petitioners' Amici*, that public-sector unions' collective bargaining rights are somehow responsible for under-funded pensions or difficult fiscal situations some states face. To the contrary, public pensions are legislatively created; their funding (or under-funding) is a result of governmental decision-making that often ignores

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[6] State Attorneys General Brief at 1, 11.

[7] *See* CAL. GOV'T CODE §§ 20000-22944.5 (West); MICH. COMP. LAWS ANN. 38.1, *et seq.* (West 1995).

unionized workers. In most instances, pension-fund shortfalls are the result of poor funding discipline exacerbated by outside economic forces that create funding circumstances like those cited by *Petitioners' Amici* here.

ARGUMENT

I. PUBLIC PENSION SYSTEMS ARE LEGISLATIVE CREATIONS THAT GENERALLY PRE-DATE PUBLIC-SECTOR UNIONS

Public pensions serve a vital role in the United States economy. For over 100 years, public pensions have served to fund retirement benefits nationwide for, among others, police, firefighters and teachers.[8] In fact, the first law creating retirement benefits for public employees was passed in New York State in 1857, which provided a lump sum payment to New York City police officers injured in the line of duty.[9] In 1878, the plan was revised to provide a lifetime pension for police officers at age 55 after completing

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[8] Gary W. Anderson & Keith Brainerd, *Profitable Prudence, The Case for Public Employer Defined Benefit Plans*, 207 (Pension Research Council, Working Paper No. 06, 2004), *available at* http://www.pensionresearchcouncil.org/publications/document.php?file=92.

[9] *The Evolution of Public Pension Plans: Past, Present and Future*, NATIONAL CONFERENCE ON PUBLIC EMPLOYEE RETIREMENT SYSTEMS 3 (March 2008).

21 years of service.[10] This same coverage was afforded New York City's firefighters in 1866. The earliest municipal plan for teachers was established in New York's borough of Manhattan in 1894.[11] Six state teacher retirement systems date back to the beginning of the 20th century: North Dakota and California established plans in 1913, followed by Massachusetts in 1914, Connecticut and Pennsylvania in 1917 and New Jersey in 1919.[12]

Most public pension plans were established in the 1920's and 1940's; first, by municipal authorities, then by states, and then by the federal government.[13] At the outset, public employees were unable to participate in Social Security and relied entirely on the benefits from the pension plans for retirement.[14] Eventually, Congress amended the Social Security Act to permit participation by public employees. Presently, however, most state employees in 15 states (*i.e.*, Alaska, California, Colorado, Connecticut, Georgia, Illinois, Kentucky, Louisiana, Maine, Massachusetts, Missouri, Nevada, Ohio, Rhode Island, and Texas) are not covered by Social Security and rely almost entirely on pension benefits for

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10 *Id.* (citing COMM. ON EDUC. AND LABOR. 95TH CONG., PENSION TASK FORCE REP. ON PUB. EMP. RET. SYS. 61 (Comm. Print 1978).

11 *Id.*

12 *See supra* note 8, at 207.

13 *Id.*

14 *Id.*

retirement security.[15] While the make-up of specific public pension plans vary, nearly all (including California, Illinois, Michigan and all *Amici* States) are created by legislation.[16] Moreover, the benefits and administration of the states' retirement systems are generally handled through legislation or the actions of legislatively enacted bodies.[17]

Public pensions were adopted and continue to be relied on by state and municipal entities to provide incentives for recruiting and retaining quality employees, for supplementing compensation for public-sector employees in competition with demand from the private-sector and to provide base retirement benefits.[18] Because these purposes benefit the government, legislatures and governmental bodies

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15 *Id.*; *Social Security Offsets: Frequently Asked Questions*, NAT'L EDUC. ASS'N, http://www.nea.org/home/16819.htm (last visited Nov. 7, 2015).

16 *See, e.g.*, Cal. Gov't Code §§ 20000-22944.5 ; Mich. Comp. Laws Ann. 38.1; 40 Ill. Comp. Stat. 5/1, *et seq.*; Ala. Code § 36-27 *et seq.* (1945); Ariz. Rev. Stat. Ann. § 38-712 (2014); Ark. Code Ann. §§ 19-5-914, 916-19 (1997); Col. Rev. Stat. § 24-51-101, *et seq.* (2015); Fla. Stat. § 121.011, *et seq.* (2012); Ga. Code Ann. § 47-1-1, *et seq.* (2010); Ind. Code § 5-10, *et seq.*; Kan. Stat. Ann. § 74-49, *et seq.* (1961); Neb. Rev. Stat. § 84-15, *et seq.* (2011); Nev. Rev. Stat. § 23-286, *et seq.* (2009); S.C. Code Ann. § 9-1, *et seq.* (2012); Tex. Gov't Code Ann. § 822, *et seq.* (West 2009); Utah Code Ann. § 49-11, *et seq.*; W. Va. Code § 5-10-1, *et seq.* (2015); Wisc. Stat. § 40.01, *et seq.* (2015).

17 *Id.*

18 *Id.*; *see also* Ariz. Rev. Stat. § 38-712 (2014); Robert L. Clark, Lee A. Craig & Jack W. Wilson, A HISTORY OF PUBLIC SECTOR PENSIONS IN THE UNITED STATES 9 (Pension Research Council, 2003).

generally make decisions to alter benefits, as was the case with increases in Social Security benefits in 1935 and 1975 and reductions to those benefits in 1977 and 1983.[19] Moreover, historically, it has even been a subject of legislative/governmental prerogative to decide what assets pension funds will hold as investments.[20]

Importantly, at the time public pensions were formed and benefits pursuant to those acts adopted into legislation, public-sector employees did not have the legal right to collectively bargain. For instance, in Illinois, public-pension systems have been operating for over 100 hundred years with some of the largest state systems dating back at least to 1963.[21] The Illinois Public Labor Relations Act which granted public employees legally protected collective bargaining rights, however, was not even adopted until 1983.[22] In California, the California State Teachers' Retirement System was established by law before 1944,[23] while the California Public Employee Relations Board did not come into existence until

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19 CLARK, CRAIG & WILSON, *supra* note 18, at 8.

20 *Id.*

21 *Supra* note 3.

22 5 ILL. COMP. STAT.315/1, *et seq.*; *see also* Sally J. Whiteside, Robert P. Vogt & Sheryl R. Scott, *Illinois Public Relations Laws: A Commentary and Analysis*, 60 CHI.-KENT L. REV. 4 (1984).

23 1 CAL. STATE TEACHERS' RET. SYS., *Forward* to TEACHERS' RETIREMENT LAW (2013), *available at* http://www.calstrs.com/sites/main/files/file-attachments/calstrs_trl_2013_vol1.pdf (Stating that California Teachers' Retirement Law was revised in June 1944).

1968.[24] It is simply not the case that the development of pensions was a result of collective bargaining on behalf of unions. To the contrary, pensions were established, as a matter of legislative policy, to address critical issues relating to compensation and retention of public workers.

As of 2011, state and local government retirement plans covered 14.7 million active workers, 7.6 million retirees, and 4.4 million former employees who were entitled to pension benefits upon retirement (these are former public employees, not yet retired, who are entitled to pension benefits upon retirement).[25] That is a total of 26.7 million Americans who will rely, to some extent, on public-pension benefits in retirement–potentially over 20% of the U.S. workforce.[26] In sheer impact to lives and retirement, aside from Social Security, public pensions are nearly unparalleled in the level to which they have provided and continue to provide for dignified retirements for individuals who choose to dedicate their lives to public service.

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24 CAL. GOV'T CODE §§ 3500-3511.

25 *The Top 10 Benefits of Maintaining Defined Benefit Pension Plans*, NCPERS RESEARCH SERIES, Jan. 2011, at 2, *available at* http://www.ncpers.org/files/2011_ncpers_research_series_top_ten.pdf.

26 *Id.*

II. PRIMER ON THE DIFFERENCES BETWEEN PUBLIC AND PRIVATE PENSION PLANS

Most state and local public-pension plans are based on the defined-benefit model.[27] In a defined-benefit pension program, the employer pays the employee a benefit amount at retirement based on a specific formula.[28] The formula is generally set by state statute.[29] Benefits are paid from (i) mandatory employee contributions that are paid out of each paycheck; (ii) employer contributions; and (iii) returns on such funds when a plan sponsor then invests the money and (ideally) increases the fund's assets.[30] When an employee reaches a specified number of years worked and a certain retirement age, the employee is able to retire and then receives a monthly payment from the pension fund that is based on a percentage of his or her salary and the number of years worked.[31]

On the other hand, private-pension plans are, for the most part, defined-contribution plans, not defined-benefit plans.[32] In a defined-contribution plan the employer provides contributions to an account established for each participating employee and the

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27 Honor Moore, *The Public Pension Reform Problem*, 22 Elder L.J. 249, 254 (2014).

28 *Id.*

29 *See, e.g.*, 40 ILL. COMP. STAT.5/14-131(e) (2015).

30 Moore, *supra* note 27, at 254.

31 *Id.*

32 *Id.*

final retirement benefit reflects the total of employer contributions, employee contributions, and investment gains or losses. Employees voluntarily pay contributions from each paycheck to an individual investment fund that allows them to choose particular investments.[33] The employer may also contribute to the fund at a percentage that is determined according to its plan at the time the employee is hired. Employer contribution is often a percentage of the employee's salary or a percentage of the company's profits.[34] When the employee reaches the age of retirement, the value of their pension plan is the value of their investment fund–not a percentage of their former salary.

Private-pension plans are regulated by the Employee Retiree Income Security Act of 1974 ("ERISA").[35] But, by its express terms, ERISA generally does not apply to "governmental plans."[36] Thus, public-employee pension systems are regulated by the federal government for federal employees, and by state and local governments for their respective employees.[37] Commentators have noted that the lack

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[33] *Id.*

[34] *Id.*

[35] The Employee Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. § 1001(b) (1978).

[36] *Id.* § 1003(b)(1) ("The provisions of this title shall not apply to any employer benefit plan if—such plan is a governmental plan (as defined in Section 1002(32).").

[37] Paul M. Secunda, *Constitutional Contracts Clause Challenges in Public Pension Litigation*, 28 HOFSTRA LAB. & EMP. L.J. 263, 267-68 (2011).

of an "overseeing agency" that requires state and local pension plans sponsors to make their actuarially required contributions has contributed to the pension funding crisis.[38]

III. THE PUBLIC PENSION CHALLENGES EXPERIENCED IN NUMEROUS STATES, INCLUDING ILLINOIS, ARE MOST-OFTEN THE RESULT OF UNDERFUNDING AND OUTSIDE FINANCIAL PRESSURES

Scholars have noted that the causes of pension underfunding, when it occurs, are "complex" and certainly not subject to the overly simplistic–and unsupported–arguments advanced in the Rauner Brief, the Illinois State Workers Brief and the State Attorneys General Brief.[39] The Pew Center on the States ("Pew Center") identified four major causes for pension underfunding: "(1) the volatility of pension-plan investments; (2) states falling behind in their payments; (3) ill-considered benefit increases; and (4) other structural issues."[40] Pension-plan investments were hit particularly hard by the recent recession, and those plans that included investments in real

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38 Natalya Shnitser, *Funding Discipline For U.S. Public Pension Plans: An Empirical Analysis of Institutional Design*, 100 IOWA L. REV. 663, 670 (2015).

39 Gavin Reinke, *When a Promise Isn't a Promise: Public Employers' Ability to Alter Pension Plans of Retired Employees*, 64 VAND. L. REV. 1673, 1675 (2011).

40 PEW CTR. ON THE STATES, THE TRILLION DOLLAR GAP: UNDERFUNDED STATE RETIREMENT SYSTEMS AND THE ROADS TO REFORM 12 (2010) [hereinafter PEW CTR.].

estate were further affected by declines in the real-estate market.[41]

Although the rebound in financial markets over the past several years has been favorable news to pension plan investments, underfunding remains due to chronic failures by both states and localities to make proper payments to the funds. Indeed, "[e]xperts have identified the lack of funding discipline—defined here as the failure by public employers to make consistent payments of the so-called "annual required contribution" ("ARC")–as a very serious, non-market related cause of pension underfunding for some plans."[42] Even though making the full ARC payments is considered essential for the responsible management of long-term liabilities,[43] public employers

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41 Reinke, *supra* note 39, at 1676.

42 Shnitser, *supra* note 38, at 670.

43 *Id.* (The Pew Center's "research shows that states that consistently make their full payments have better-funded retirement systems and smaller gaps.") (citing PEW CTR.); *supra* note 40, at 6 ("Keeping up with the annual required contribution is perhaps the most effective way that states can responsibly manage their long-term liabilities for public sector retirement benefits."). *See also* FITCH RATINGS, ENHANCING THE ANALYSIS OF U.S. STATE AND LOCAL GOVERNMENT PENSION OBLIGATIONS 3 (2011), *available at* http:// www.ncpers.org/Files/2011_enhancing_the_analysis_of_state_local_government_pension_obligations.pdf ("The systems that pose the greatest risks are those with significant unfunded liabilities for which the government's annual payments have been significantly less than an actuarially determined ARC over multiple years."); Jun Peng & Ilana Boivie, Nat'l Inst. On Ret. Sec., *Lessons From Well-Funded Public Pensions: An Analysis Of Six Plans That Weathered The Financial Storm, 6* (2011), *available at* http://

have exhibited tremendous variation in funding discipline, with some states and localities habitually skipping or underpaying their ARCs.[44]

Underfunding is sometimes systematic for pension funds, as when states codify unrealistically low employer contribution rates; sometimes underfunding is episodic, as when legislators decide to cut their states' contributions to pension systems to balance the state budget during difficult fiscal times.[45] In some instances, states have even withheld required pension contributions to fund tax cuts. For example, in New Jersey, in the 1990s, the state slashed its annual pension contributions in order to finance a slate of tax cuts, and recently, Governor Chris Christie withheld a $3 billion contribution to the state's pension system, while pushing for $1 billion in tax cuts.[46] In 1994, Illinois passed pension legislation that the federal Securities and Exchange Commission deemed a "fraud" warranting the SEC's entry of a cease-and-desist order.[47] Regardless of the

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www.ncpublicschools.org/docs/humanresources/benefits/lessons-pensions.pdf ("The most fundamental principle in ensuring a plan achieves a 100% funding ratio is ensuring that the plan sponsors pay the entire amount of the annual required contribution (ARC) each year, because anything short of a full ARC payment will have a negative impact on the plan's funding ratio in the long run.").

44 *Id.*

45 Jack M. Beermann, *The Public Pension Crisis*, 70 WASH & LEE L. REV. 44 (2013).

46 *Id.* at 44 n.151.

47 Editorial, *Illinois: From Deadbeat to Fraud*, CHI. TRIB., Mar.

particular reason for skipping or reducing the pension payments, chronic underfunding, when it occurs, can place severe stress on the fiscal integrity of pension plans.

IV. *PETITIONERS' AMICI'S* ARGUMENTS ABOUT COLLECTIVE BARGAINING'S IMPACT ON PENSION UNDERFUNDING ARE COMPLETELY UNSUPPORTED

The Rauner Brief insinuates that union activity is responsible for "structural budget deficits" and "repeated credit downgrades in Illinois"[48]; the Illinois Workers Brief argues that Illinois' "enormous unfunded pension liability" is the "product of public sector unions' bargaining and influence";[49] and the State Attorneys General Brief argues that collective bargaining by public-sector unions led to Detroit's unfunded pension liability and eventual bankruptcy. All of these arguments are without merit and lack support. However, the idea that collective bargaining is responsible for pension underfunding is a pervasive misconception that is being trumpeted in certain corners. In fact, this Court recently noted in *Harris v. Quinn*, 573 U.S. __, 134 S. Ct. 2618, 2632 fn7 (2014) that since 1977, "state and local expenditures on (public) employee wages and benefits have mushroomed" and cited to a source that suggested that public-sector unions are the cause of Illinois'

13, 2013, *available at* http://articles.chicagotribune.com/2013-03-13/opinion/ct-edit-sec-20130313_1_pension-mess-pension-burden-pension-obligations.

[48] Rauner Brief at 4, 7-8.

[49] Illinois State Worker's Brief at 4.

public pension crisis.[50] It is time to set the record straight.

The arguments put forth by Rauner and the Illinois Workers are not only disingenuous, they are flatly contradicted by recent findings of the Illinois Supreme Court. In *In Re Pension Reform Litigation* 2015 IL 118585, ¶ 11, 32 N.E.3d 1 (2015), the Illinois Supreme Court noted that the problem of inadequate funding of public pensions preceded collective bargaining and has been around for nearly 100 years. The Illinois Supreme Court noted:

> As long ago as 1917, a report commissioned by the General Assembly characterized the condition of State and municipal pension systems as 'one of insolvency' and 'moving toward a crisis' because of financial provisions which were 'entirely inadequate for paying the stipulated pensions when due.'[51]

In fact, *amici* fail to mention that Illinois has underpaid its contributions for decades. Between 1996 and 2011, Illinois underpaid pension contributions by $28 billion.[52] Some observers have noted

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50 *Id.* (citing Daniel DiSalvo, *The Trouble with Public Sector Unions*, NATIONAL AFFAIRS 5, Fall 2010, at 15) ("In Illinois, for example, public-sector unions have helped create a situation in which the state's pension funds report a liability of more than $100 billion, at least 50% of it unfunded.").

51 *Id.* (citing ILL. PENSION L. COMM., REP., 2D SESS., at 272 (1917)).

52 *See* STATE BUDGET CRISIS TASK FORCE, FULL REPORT 38 (2012), *available at* http://www.statebudgetcrisis.org/wpcms/wp-content/images/Report-of-the-State-Budget-Crisis-Task-Force-

that in Illinois the "biggest reason the public pensions are severely underfunded is because the state [of Illinois] has consistently failed to pay its ARC."[53]

In Illinois, the funding formulas for the state's largest public pensions are set by statute.[54] The Illinois Supreme Court noted that as early as 1982, Illinois funded its pensions using an approach which the United States Securities and Exchange Commission (SEC) has characterized as bearing "no relation to actuarial calculation."[55] Legislative efforts to address pension underfunding contained "inherent short-

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Full.pdf.

53 *See* Moore, *supra* note 27, at 278. However, the Illinois Municipal Retirement Fund ("IMRF") is one of the larger Illinois pension funds serving almost 3,000 employers and managing approximately $33 billion in assets. *See* ILL. MUN. RET. FUND, https://www.imrf.org (last visited Nov. 11, 2015). In contrast to the other large Illinois pension funds, the IMRF is well funded due to adhering to sustained fiscal discipline. *See*, Opinion, Diane Oakley, *Here's One Public Pension That Survived the 2008 Crisis*, CRAIN'S CHI. BUS. Sept. 9, 2015, (noting that the IMRF continues to be well funded because the member municipalities faithfully made their contributions); *see also*, ILL. MUN. RET. FUND, *Illinois Budget Stalemate Will Not Affect IMRF Pension Payments* (Oct. 15, 2015), https://www.imrf.org/en/news/imrf-not-impacted-by-illinois-budget-stalemate (stating that the IMRF is not impacted by the Illinois budget stalemate because unlike other pension funds, the "IMRF receives no funding from the State of Illinois.").

54 *See, e.g.*, 40 ILL. COMP. STAT.5/14-131(a) (2015).

55 *In Re Pension Reform Litigation*, 2015 IL 118585, ¶ 17 (citing State of Illinois, Exchange Act Release No. 9389, 2013 WL 873208 (Mar. 11, 2013)) [hereinafter, SEC Order].

comings" and failed to solve the looming and systemic problems with the pension funds.[56] The SEC's cease-and-desist order did not mince words regarding the cause of underfunding of Illinois' pension systems:

> [t]he Statutory Funding Plan's contribution schedule increased the unfunded liability, underfunded the State's pension obligations, and deferred pension funding. The resulting underfunding of the pension systems ('Structural Underfunding') enabled the State to shift the burden associated with its pension costs to the future and, as a result, created significant financial stress and risks for the State.[57]

Illinois' pension underfunding challenge is best explained, as follows, by the State Budget Crisis Task Force:

> [i]t is human nature to prefer the present to the future. Governments display that time preference by promising now and paying later: if they can, they will underestimate liabilities, underfund annual costs, and take on substantial investment risks to make it look like promises will be kept.[58]

Simply put, politicians have failed for decades to properly fund, and manage through legislation, the public-pension systems in Illinois. This failure cannot

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[56] *Id.*, at ¶ 19.

[57] *Id.* (citing SEC Order, at 3); s*ee also* Editorial, *supra* note 46.

[58] *Supra* note 54, at ¶ 45.

be placed at the doorstep of the unions. In contrast, even when Illinois underfunded the pension systems, public employees faithfully contributed their statutorily-mandated share to those pension systems.

Notably, the problem of underfunding of public pensions is not restricted to Illinois; it is a problem that occurs throughout the country. Chronic underfunding of public pensions outside of Illinois was taking place even before the global economic crisis in 2008.[59] Thus, it is wrong to suggest that public-sector unions are creating a pension funding problem, either in Illinois or in other states. The lack of funding discipline and the failure of state and local governments to meet the annual contributions are the true "culprits", when serious underfunding occurs.[60]

The State Attorneys General Brief's unsupported argument that collective bargaining by public-sector unions led to Detroit's unfunded pension liability and eventual bankruptcy does not withstand scrutiny. The City of Detroit's bankruptcy was driven by multiple factors, not by collective bargaining as the State Attorneys General's Brief suggests.[61] The major contributors to Detroit's bankruptcy included depopulation and long-term unemployment, which caused Detroit's property and income tax revenues to plummet; slashing of state-revenue sharing;

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59 Jonathan Barry Forman, *Funding Public Pensions*, 42 J. MARSHALL L. REV. 837, 869 (2009); *see also* STATE BUDGET CRISIS TASK FORCE, FULL REPORT 38-42.

60 Shnitser, *supra* note 38, at 665.

61 State Attorneys General's Brief, 11-17.

unfavorable debt financing; and general cash-flow problems.[62] Detroit's bankruptcy was not caused by collective bargaining or union activity, rather it "was primarily caused by a severe decline in revenue and exacerbated by complicated Wall Street deals that put its ability to pay its expenses at greater risk."[63] In fact, commentators have stated that "[t]he city's pension contributions in particular did not play a role in pushing it into bankruptcy because they did not contribute materially to the increase in the city's legacy expenses that added to the cash flow shortfall."[64]

The arguments attempting to blame the bankruptcy filings by the City of Stockton and the City San Bernardino suffer from similar deficiencies. *Amici* simply cherry-picked snippets from bankruptcy filings to paint a false picture of the circumstances that led to those bankruptcy filings, and then, by implication, seeks to tie those bankruptcies directly to collective bargaining and union activity. This ploy is transparent and not supported by the facts. Commentators have noted that "no single decision,

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62 Wallace C. Turbeville, *The Detroit Bankruptcy*, DEMOS, Nov. 2013, at 1-4, *available at* http://www.demos.org/sites/default/files/publications/Detroit_Bankruptcy-Demos.pdf.

63 *Id.* at 4.

64 *Id.* at 4; *see also* Paul Krugman, *Detroit, the New Greece*, N.Y. TIMES, July 21, 2013, *available at* http://www.nytimes.com/2013/07/22/opinion/krugman-detroit-the-new-greece.html?_r=3& (Outlining reasons for the bankruptcy that were unrelated to pension obligations and stating that "for the most part the city was just an innocent victim of market forces.").

act, group, or circumstance is entirely at fault" for Stockton's financial demise and bankruptcy.[65] Others have noted that San Bernardino depended on property and sales taxes for its revenues and with the value of its housing stock and the disposable income of its residents both in free-fall, San Bernardino saw its revenues hemorrhage.[66] In fact, others have noted that "[w]hat sets Stockton and San Bernardino apart is that they were at the epicenter of the California housing bubble and the California housing bust."[67] Thus, *amici's* attempt to place the blame for the bankruptcies of Detroit, Stockton and San Bernardino on unions and collective bargaining rights of its members fails.

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65 Syndey Evans, Bohdan Kosenko & Mike Polyakov, *How Stockton Went Bust: A California City's Decade of Policies and the Financial Crisis That Followed* 2, *available at* http://cacs.org/pdf/12.pdf.

66 Harold Meyerson, *Why Is San Bernardino Bankrupt?* THE AMERICAN PROSPECT, July 13, 2012, *available at* http://prospect.org/article/why-san-bernardino-bankrupt.

67 *Id.*

CONCLUSION

For the reasons set forth above, issues related to public-pension funding are not germane to the dispute before this Court. Therefore, the arguments by certain *Petitioners' Amici* relating to public-pension funding should be rejected.

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